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**Issue Date: 13 March 2006**

**CASE NO.: 2005-LHC-724**

**OWCP NO.: 07-163875**

**IN THE MATTER OF:**

**SAU DINH**

**Claimant**

**v.**

**STRUCTURE SERVICES, INC.**

**Employer**

**and**

**KYE, INC.**

**Alleged Borrowing Employer**

**and**

**LOUISIANA COMMERCE & TRADE ASSOCIATION**

**Carrier**

APPEARANCES:

JAMES E. CAZALOT, JR., ESQ.
For The Claimant

PATRICK H. PATRICK, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Sau Dinh (Claimant) against Structure Services, Inc. (Employer), KYE, Inc. (KYE), and Louisiana Commerce & Trade Association (Carrier).

Prior to formal hearing in this matter, Judge Stanwood R. Duval ruled on a motion for summary judgment filed by KYE in the United States District Court for the Eastern District of Louisiana. In his ruling, Judge Duval noted the contract between Employer and KYE contained the following language: "[Employer] agrees to indemnify and hold KYE harmless of any claim due to negligence or injuries of their employees, or any governmental claims for withholding taxes, FICA taxes, and unemployment taxes attributable to the covered workers." He found the contract created an arrangement whereby Employer provided employees to KYE and agreed to provide workers' compensation insurance. He interpreted the clause as an indemnification clause, as contemplated by Total Marine Services, Inc. v. Director, OWCP, 87 F.3d 774, (5th Cir. 1996), and its progeny and dismissed Carrier's intervention. (EX-6).

Subsequently, Employer/Carrier filed a motion for summary judgment with the Office of Administrative Law Judges, contending that KYE was responsible for Claimant's compensation benefits. Based on Judge Duval's interpretation of the language in the contract between Employer and KYE, the undersigned denied the motion for summary judgment.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 20, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 28 exhibits, Employer/Carrier proffered 11 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

[1] References to the transcript and exhibits are as follows: Transcript: Tr._; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on May 27, 2002.

2. That Claimant's injury occurred during the course and scope of employment.

3. That Claimant was on the payroll of Employer and was the borrowed employee of KYE at the time of accident.

4. That the Employer was notified of the accident/injury on May 27, 2002.

5. That an informal conference before the District Director was held on September 21, 2004.

6. That Claimant received temporary total disability benefits from May 28, 2002 through November 29, 2004 at a compensation rate of $481.78 for 131 weeks, for total benefits of $63,113.18.

7. That Claimant's average weekly wage at the time of injury was $722.64.

8. That medical benefits for Claimant have been paid through November 29, 2004, pursuant to Section 7 of the Act.

9. That Claimant has not reached maximum medical improvement.

## II. ISSUES

The unresolved issues presented by the parties are:

1. The identity of the responsible employer.

2. The identity of the responsible carrier.

3. Attorney's fees and interest.[2]

## III. STATEMENT OF THE CASE

### The Testimonial Evidence

### Claimant[3]

Claimant was born in 1960 and resided in New Orleans, Louisiana, at the time of formal hearing. He estimated that he had a fourth or sixth grade education while in Vietnam and he could read some English. (Tr. 35, 45-46). He last worked on May 26, 2002. In May 2002, he had been employed by KYE as a welder and fitter for approximately one year. His job duties included cutting steel, picking up steel, and welding steel. (Tr. 35). He stopped working at the shipyard because he fell. (Tr. 37).

Claimant testified that he was working in the tunnel of a ship on the day of his accident. There was not "enough air in the air hole" and the heat caused him to become dizzy. He fell approximately 20 feet. (Tr. 37). He sustained the following injuries: bleeding in his eyes, ears, and nose; a broken arm; injuries to his left hand and lower back; a tear in his brow bone; and two holes in his chest area. He also had a steel rod placed in his hand.[4] (Tr. 38).

Claimant received emergency room treatment for his injuries and subsequently treated with several physicians. (Tr. 39). He saw Dr. Shamsina three weeks before formal hearing and presented with complaints of increased headaches, neck pain, lower back pain, and muscle spasms. (Tr. 39-40). He experienced these problems since his accident and Dr. Shamsnia prescribed medication for the headaches and muscle spasms. (Tr. 40-41).

Claimant testified that he is not able to work because of his frequent muscle spasms and headaches and that he experiences back pain with prolonged sitting. (Tr. 41-42). He has not tried to work since his May 2002 injury. His doctors told him not to carry heavy objects and told him not to return to work. (Tr. 43-44).

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[2] At formal hearing, the parties agreed that penalties were not at issue. (Tr. 18).

[3] Claimant testified through an interpreter at formal hearing.

[4] The testimony does not indicate which hand.

Claimant received his paycheck from the same company that paid his Vietnamese co-workers, but he did not know who paid his co-workers of other races. (Tr. 43). Since his May 2002 accident, he borrows money from friends, but has not earned money for work of any sort. (Tr. 45).

**Victor Prudhomme**

Mr. Prudhomme, who testified at formal hearing, is the claims manager for National Loss Control Management, which is the "third party administrator" for Carrier. (Tr. 49-50). His job duties include reviewing insurance policies to verify coverage for claims and working on policy language, including language concerning coverages. (Tr. 50-51).

Prior to formal hearing, Mr. Prudhomme reviewed the "renewal agreement in the original certificate of insurance concerning [Employer]" to determine who was covered and whether there was an "F-class."[5] The certificate listed Employer as the insured and the policy did not indicate that it covered anyone other than Employer. (Tr. 51-54; EX-3). Mr. Prudhomme did not find coverage for KYE. (Tr. 54).

Mr. Prudhomme testified that the insurance policy was a workers' compensation policy and an employer's liability policy. It covered the workers' compensation liabilities of Employer and Employer's liabilities in any tort claim brought against Employer within the policy limits. (Tr. 54). Employer's liability coverage contained a specific exclusion for workers' compensation claims. (Tr. 55).

The insurance policy did not cover any contractual liabilities assumed by Employer and it did not include an additional insured endorsement or an alternate employer endorsement. (Tr. 55, 58). A request for an additional insured or alternate employer endorsement would usually arise when the insured company was doing business with another entity. (Tr. 56). Employer was the only insured under the policy in question. No additional premium was charged to Employer to extend coverage to another entity. (Tr. 58).

Carrier's "policy file" contained a workers' compensation application that identified Employer as an iron shop involved in "steel fabrication, shop construction, barbecue pits, fire

[5] An "F-class" is a classification of employment that indicates longshore payroll. (Tr. 52).

racks, skids, pipe racks, handrails, and stairs." (Tr. 60; EX-7, p. 27). The application listed fifteen "iron or steel-fabrication-shop-structure & drivers," two salesmen, and one clerical employee. The description of operations would have been provided by Employer through the agent. (Tr. 61).

Mr. Prudhomme did not have knowledge of any submissions by Employer that showed a change in the nature of its work. His review of documents further did not reveal any documentation, filed before Claimant's claim, that indicated Employer changed the nature of its work to operate as a shipyard labor pool. (Tr. 62). To the best of his memory, Carrier did not become aware of an agreement between Employer and KYE until after Claimant's accident and during the course of litigation, when it learned that Employer supplied 37 workers to a shipyard in New Orleans, Louisiana. (Tr. 63-64).

An auditor determines "a premium to be paid based upon the amount of money that was paid to the workers applied to the rating classifications."[6] (Tr. 65). An audit of Employer's payroll records did not include a payroll for 37 shipyard workers. (Tr. 66; EX-9). The audit materials concerning the calculation of Employer's 2001 and 2002 premiums did not contain a "6872" code, which is the class code for general ship repair workers or shipyard workers. (Tr. 67).

Mr. Prudhomme stated that Carrier is only allowed to write longshore coverage on an "incidental basis." He agreed an "incidental basis" would be "where you have a state classification, and you have an F-loading because occasionally they might go onto a barge, or a vessel to install a handrail or something." A labor pool provider for a ship repair facility is not engaged in an incidental longshore operation. (Tr. 69).

An audit identified the employees whose payroll composed the figure upon which Employer paid its premium for the policy period of January 1, 2002 to June 13, 2002. (EX-9). Claimant and another employee were identified with "3030F" codes and both had "claims against the fund."[7] (Tr. 73). He testified that the acronym "USLH," which followed both names, was an abbreviation indicating a longshore payroll and longshore coverage. (Tr. 74-

[6] A "premium auditor" goes to an insured's location to review records and verify that the insured is reporting accurate payroll information. (Tr. 64).
[7] A "3030F" classification indicates iron/steel fabrication "inside the shop" and the "F" would indicate a longshore classification for an insured who occasionally installed components on a barge or a vessel. (Tr. 67-68).

75). Mr. Prudhomme could not determine whether the coverage was incidental coverage as opposed to full longshore coverage based on the audit. (Tr. 75). He opined handwritten notations of "USLH" and "HW," in the "Specify Additional Coverages/Endorsements" section of the original application for insurance coverage, represented "United States Longshore and Harbor Workers' Act." He did not know when the notation was written, nor did he know who wrote it. (Tr. 83; EX-7).

Carrier was aware that Employer had 37 employees at the time of the final audit on October 21, 2002, and should have tried to collect premiums for these employees in the final audit. (Tr. 85-86). Mr. Prudhomme did not review the contract between Employer and KYE to determine whether the contract called for an additional insured endorsement or an alternate employer endorsement. (Tr. 86-87).

Mr. Prudhomme agreed Employer had workers' compensation coverage underwritten by Carrier, but indicated the certificate of insurance did not reflect that the workers' compensation coverage in favor of Employer extended to cover the liabilities of KYE. (Tr. 87-88). The "Description of Operation" section shows a waiver of subrogation of maritime liability; the maritime liability policy is not Carrier's policy. (Tr. 88).

There was no "mechanism" to allow the adjuster to audit KYE's records and collect premiums from KYE for its workers' compensation liabilities at the time of Claimant's accident. (Tr. 89). If Carrier had received the contract between Employer and KYE before Claimant's accident, Carrier would not have agreed to extend coverage to the workers' compensation liabilities of KYE. If Employer had informed Carrier that it agreed to furnish insurance for the workers it provided to KYE, Carrier would have cancelled Employer's coverage. (Tr. 90). Carrier did not have the option to extend coverage in favor of KYE based on Carrier's underwriting guidelines and its agreement with the Department of Labor. (Tr. 90-91).

Carrier paid benefits totaling $63,113.18, excluding medicals, to Claimant under the Act. Carrier paid the benefits on behalf of Employer. (Tr. 81).

**Mack Groves**

Mr. Groves, the owner-operator of Employer, was deposed by the parties on June 29, 2005. (CX-27, p. 5). Employer came into existence in or around 2001 and initially hired employees

on a part-time basis to do fabrication work at a shop in Morgan City, Louisiana. (CX-27, p. 8). Before working with KYE, Employer performed five or six small fabrication contracts. (CX-27, pp. 9-10). Employer had workers' compensation insurance when it performed the small contracts, which was negotiated through Lou Oldenberg, an insurance agent.[8] (CX-27, p. 14). At that time, Mr. Groves did not expect employees to work on the water. (CX-27, p. 15). He could not recall with certainty whether he told Mr. Oldenberg that he was pursuing the contract with KYE and he did not know whether Mr. Oldenberg contacted KYE. (CX-27, p. 17).

In late 2000, Mr. Groves met with Alan Moore to discuss an opportunity to provide personnel to KYE. (CX-27, pp. 8, 10-11). Mr. Groves later met with Alan Moore and Ray Groot, but did not obtain a contract until their third or fourth meeting. (CX-27, pp. 12, 18).

Employer was to provide labor to KYE on an on-going, as needed basis. (CX-27, p. 20). Individuals were informed of the type of labor involved and were sent to KYE's yard to fill out an application. KYE met the applicants and made the hiring decisions, although Mr. Groves recalled meeting with "just a few" applicants. (CX-27, p. 21).

In addition to providing laborers, the contract required Employer to provide workers' compensation insurance and "generally billing insurance."[9] (CX-27, p. 21). Mr. Oldenberg provided a copy of the certificate of insurance directly to KYE and Mr. Groves "guess[ed] it was okay because nothing came back."[10] (CX-27, p. 22). Mr. Groves testified that he must have explained the arrangement between Employer and KYE to Mr. Oldenberg, otherwise Mr. Oldenberg would not likely have sent the insurance policy to KYE. (CX-27, p. 23).

Mr. Groves did not think his insurance premiums changed after he first bought insurance for Employer, but he indicated that he may have "added different things on it" and that KYE may have wanted "additionally insured" added to it. If he contacted Mr. Oldenberg about the "additional insured," the contact would

[8] It is not clear whether Employer purchased insurance to cover longshoremen.
[9] Mr. Groves became aware that he was going to provide insurance during the first meeting with Mr. Moore and Mr. Groot. He thought his existing insurance was good enough. (CX-27, p. 61).
[10] Before Claimant was injured, Mr. Groves went to KYE to ensure that the certificate of insurance had been received and the secretary showed it to him. (CX-27, p. 54).

have occurred before May 2002 to "make sure whatever they wanted was taken care of." (CX-27, p. 18). He did not see the insurance certificate and did not know whether KYE was listed as an additional insured on the policy. (CX-27, p. 23). He was not certain whether KYE asked to be added as an additional insured or alternate employer on Employer's insurance policies. (CX-27, p. 56).

Employer processed the payroll for the employees it provided to KYE. (CX-27, p. 23). The employees at KYE were not supervised by Mr. Groves or anyone else who may have distributed Employer's paychecks. (CX-27, p. 24). In May 2002, Employer's payroll included the KYE employees, Mr. Groves, Francis Elder, and a few individuals who temporarily worked in Employer's shop.[11]

The contract between Employer and KYE was effective April 6, 2001, and remained effective for one year to be renewed each year until written notice of termination was provided. Written notice of termination of the contract was never provided, but KYE stopped paying on the contract and Employer stopped providing employees early in summer 2002. (CX-27, p. 26). Some employees continued working in KYE's yard, but began working for another employment company. (CX-27, p. 28). Mr. Groves did not enter other contracts after the contract with KYE and he let his insurance "run out." (CX-27, p. 29).

Mr. Groves told his insurance company what kind of coverage he needed and believed the insurance company would take care of his coverage. (CX-27, p. 30). He wanted insurance coverage "that was necessary for the job" and "guess[ed]" that he told Mr. Oldenberg to contact KYE to ensure the right coverage.[12] Mr. Groves indicated the coverage was accepted. (CX-27, p. 31). He opined that Mr. Oldenberg may have suggested longshore coverage because Employer was located close to the water and may have wanted to do work on the water.[13] (CX-27, p. 51).

Employer paid Claimant while he worked at KYE. With regard to whether Mr. Groves believed his insurance policy would pay Claimant's workers' compensation benefits, Mr. Groves stated "It's my understanding that if you buy insurance, the person is

[11] Francis Elder's position with Employer involved payroll. (CX-27, p. 35).
[12] Mr. Groves does not specify the kind of insurance he believed was needed, nor does he specify the nature of the "job" being performed by the employees. (CX-27, p. 31).
[13] He did not remember any crews doing off-site fabrication or working on a vessel in Morgan City. (CX-27, p. 52).

covered." (CX-27, p. 34). Mr. Groves was not told that there would be a problem with coverage for Claimant. (CX-27, p. 37). He was not contacted about whether he had the correct kind of insurance coverage. No one told Mr. Groves that he had not paid enough premiums to provide coverage to Claimant. (CX-27, p. 38). Mr. Groves asked to see the insurance policy, but it was not provided to him. (CX-27, p. 40).

Employees only performed welding and fitting work at KYE or in Morgan City, Louisiana. (CX-27, p. 38). Only the employees at KYE worked on vessels. (CX-27, p. 43). Mr. Groves believed Employer's payroll at KYE was larger than its payroll at the Morgan City shop. (CX-27, p. 39). The payroll numbers identified on the policy were probably estimates provided to Mr. Oldenberg by Mr. Groves before his involvement with KYE. (CX-27, pp. 41-42). He did not recall providing a higher estimated payroll or having a discussion about an increase in premiums. (CX-27, p. 44).

Mr. Groves testified that Employer had twelve or fourteen employees at KYE, but also indicated that he could have been wrong about the numbers. (CX-27, p. 47). At the time of Mr. Groves's deposition, Employer remained a corporate entity, but no longer engaged in any business. (CX-27, p. 24).

**Vincent Moore**

Mr. Moore, a production manager for KYE at its Industrial Drive location, was deposed by the parties on May 26, 2004. (CX-28, p. 7). At the time of the deposition, Alan Moore was the most senior employee at the Industrial Drive location, holding the position of manager. Ray Groot also held a supervisory position at KYE. (CX-28, pp. 10-11). The employees at KYE also included an office clerk, a foreman, a junior engineer, welders, fitters, mechanics, and painters. (CX-27, pp. 12-13).

In May 2002, KYE did not directly employ welders, fitters, mechanics, or painters. It contracted all of its labor through labor contractors. In May 2002, it contracted with Employer and with a company called "Pearl River" to provide labor, while KYE provided supervision, tools, and "everything else." (CX-28, pp. 14-16). At the time of the deposition, Employer did not provide labor to KYE. The employees that were working through Employer became employees of another labor provider. (CX-28, p. 24).

Mr. Moore and Joe Pham made the hiring decisions for KYE; the decisions did not involve Employer.[14] (CX-28, p. 21). An applicant filled out an application, KYE hired him, and KYE faxed the information to Employer's office. (CX-28, p. 117). KYE paid Employer and Employer then paid the welders and its other employees. (CX-28, pp. 17, 138-39). Employer handled the insurance and issuance of paychecks. (CX-28, p. 138). On occasions when KYE fired employees provided by Employer, Mr. Moore or Mr. Pham made the firing decisions. (CX-28, p. 115). They instructed the fired employee to go home immediately and notified Employer after the fact. (CX-28, pp. 115-116).

In May 2002, Mr. Pham was the only foreman at the jobsite and Mr. Moore was his supervisor. Mr. Moore spent most of his time on the job sites and assisted Mr. Pham in supervision by providing instructions to Mr. Pham and other individuals. (CX-28, pp. 19-20). Mr. Groves occasionally went to KYE's jobsite to speak with Alan Moore, but he never gave instructions or directions to the laborers regarding their work at the shipyard. (CX-28, pp. 25, 134).

As employees arrived at work each day, Mr. Moore and Mr. Pham told them where to work for the day. (CX-28, pp. 102-103). KYE hired Claimant "for the second time" on January 7, 2002.[15] He worked as a full-time employee and his work activities were generally concentrated in the starboard stern compartment of the AMERICAN FREEDOM. (CX-28, p. 103).

KYE filled out accident reports when a subcontractor's employees had accidents at the KYE facility. (CX-28, p. 41). Mr. Pham would have filled out an accident report for Claimant's accident, but Mr. Moore did not find any report other than the LS-202. (CX-28, p. 43). Mr. Moore received notification of Claimant's accident shortly after it occurred. When Mr. Moore arrived at the KYE facility, Claimant was "groggy" but awake. An ambulance took Claimant to a hospital and Mr. Moore discussed the accident with remaining employees. (CX-28, pp. 48-50). During the conversation, he learned Claimant fell onto the bottom of the hull and was working "in an upper portion somewhere above where he fell." There were no witnesses to the accident. (CX-28, pp. 50-51). Mr. Moore investigated the accident and learned Claimant was working in the starboard side

[14] KYE did not directly employ Mr. Pham. He worked through the labor contractor. (CX-28, p. 24).

[15] Claimant was an employee of Employer, but worked full-time for KYE. (CX-28, p. 103). Claimant had been previously hired on June 11, 2001, but Mr. Moore did not know his termination date. (CX-28, p. 104).

of the stern, "on about the third level" from the bottom, when he fell. (CX-28, pp. 52, 55). Mr. Moore and Mr. Pham were responsible for making sure employees used safety equipment, but he could not remember whether Claimant was wearing a safety harness at the time of his fall. (CX-28, p. 100).

When Claimant returned to KYE's yard to perform light duty work, Employer instructed KYE to keep Claimant off work. (CX-28, pp. 104-105). Mr. Moore testified that KYE likely had light duty welding positions in certain pre-construction areas. (CX-28, p. 105).

The employees that worked through the Pearl River subcontractor also worked aboard the AMERICAN FREEDOM and took orders from Mr. Pham. (CX-28, p. 144). Mr. Moore often received complaints from welders and fitters about the heat in the compartments. He testified that the work is "hot work," but KYE provided adequate ventilation. (CX-28, p. 150).

**Louis Oldenberg**

Mr. Oldenberg, who was deposed by the parties on July 14, 2005, is an independent insurance agent with Lobdell Insurance Agency, L.L.C. (EX-10, p. 7). He first wrote workers' compensation coverage for Employer in or around 2000, and the workers' compensation risk was placed with Carrier in 2001.[16] (EX-10, pp. 8-9). On May 13, 2002, Carrier provided a 30-day notice of cancellation on Employer's policy, which became effective on June 13, 2002.[17] (EX-10, p. 10, Exh. 1). Carrier made the decision to cancel Employer's policy and indicated that the cancellation decision was based on past losses. (EX-10, p. 39, Exh. 6).

The insurance policy classified Employer's business as an "iron and steel fabrication shop, structure and drivers."[18] (EX-

[16] Mr. Oldenberg contacted Carrier's underwriter and explained the workers' compensation risk being insured. Carrier indicated it was interested in considering such a risk, so Mr. Oldenberg completed and submitted an application. (EX-10, p. 13, Exh. 2).

[17] Mr. Oldenberg did not know why Carrier issued a second notice of cancellation terminating Employer's policy effective August 22, 2002. (EX-10, p. 38, Exh. 5).

[18] Mr. Oldenberg obtained the information regarding Employer's business from a representative of Employer. (EX-10, p. 15). Mr. Oldenberg discussed Employer's exposures with Carrier's underwriter and Carrier wrote the "risk." Then, Carrier would send an inspector to Employer's place of business in Amelia, Louisiana, to ensure that the information in the insurance application was correct. (EX-10, p. 16).

10, p. 14). The description of the work indicated Employer was a steel fabrication shop "constructing barbecue pits, fire racks, skids, pipe racks, handrails, and stairs."[19] (EX-10, pp. 14-15). The policy identified class codes of iron and steel fabrication for 15 employees. Employer insisted it did not have any longshore and harborworkers at the time the policy was written, but anticipated that it may have such workers in the future; consequently, Mr. Oldenberg included a "3030F" class code to indicate longshoreman and harbor workers' exposure.[20] (EX-10, p. 14).

Mr. Oldenberg testified that the final audit for the period of 2001 to 2002 showed a premium of $7,998.00. (EX-10, p. 42, Exh. 7). Although Mr. Oldenberg testified that the final audit showed that Employer did not "pick up any exposure for the 'F' classification," he noted the difference in rates for iron steel fabrication versus a "3030F" classification and stated "[t]hey were paying for it, if they ever had the exposure to it." Mr. Oldenberg indicated that the auditor would automatically pick up the payrolls, determine if there was longshore and harbor workers exposure, and "put the payroll in that classification and charge them that rate." (EX-10, pp. 41-42). He indicated that no surcharges were added to Employer's policy. (EX-10, p. 43).

The "estimated billing" for the second term policy, dated November 17, 2001, identified longshore coverage with a $16,067.00 premium. (EX-10, pp. 44-45, Exh. 8). Employer's estimated premium for 2002 to 2003 was $24,501.00, which included the premium for longshore coverage.[21] (EX-10, pp. 54-55, Exh. 14). Certificates of insurance issued to "C-Fab" and "MAX Welders" regarding the policy period of January 1, 2002 to January 1, 2003, showed that Carrier provided workers'

[19] Employer's "Commercial Insurance Application" for the policy period of January 12, 2002 to January 12, 2003, described its operations as "ship side repair and dock side only," "minor fabrication at ship," and "occasional work on platform offshore – less than 1%." (EX-10, Exh. 13).

[20] Mr. Oldenberg recommended longshore coverage because Employer indicated employees may perform installation work on board vessels. He indicated Employer showed at least half of his hours falling within a longshore classification. (EX-10, pp. 56-57). Mr. Oldenberg also indicated that Employer did not have any longshore exposure during the first year, but later began to do more work on barges. (EX-10, p. 72).

[21] Mr. Oldenberg testified that Employer did purchase longshore coverage and paid a surcharge on the classifications for the iron steel fabrication. (EX-10, pp. 39-40). However, it is not clear from his testimony when Employer began paying for longshore coverage or began paying the surcharge.

compensation coverage to Employer, which would have included longshoreman coverage. (EX-10, p. 51).

To renew an insurance policy, Mr. Oldenberg would speak with the insured to determine that its operations had not become "radically different." The insurance company would review the insured's payroll and records to determine how employees earned their wages. From the audit, the insurance company would place the employees in "classifications" if the workers' jobs differed from the description provided on the policy. If the insured was performing different jobs and the insurance company did not want to provide coverage, the insurance company would notify Mr. Oldenberg and cancel the policy. (EX-10, p. 18).

Mr. Oldenberg's file did not contain any indication that Employer's class codes were changed at the renewal of its policy. His file did not contain any indication that Employer changed the nature of its business at the time of renewal; the business remained a "fabrication shop with the possibility of doing some longshoreman and harborworkers's exposure" through the installation of handrails and stairs. (EX-10, p. 24). Employer never notified Mr. Oldenberg that it changed the nature of its business from a fabrication shop to a labor pool provider. (EX-10, pp. 25, 37).

Mr. Oldenberg was asked to provide KYE with a certificate of insurance showing Employer's coverage.[22] (EX-10, p. 26). With regard to Carrier, the certificate certified that Employer had "a workers' compensation policy in effect covering the statutory limits and that the officers of the sole proprietor corporation [were] included for coverage under workers' comp." (EX-10, p. 31).

The insurance certificate stated "[c]ertificate holder included for waiver of subrogation on maritime liability," which indicated the maritime insurer would not take action against a third party responsible for a loss. (EX-10, pp. 31-32, Exh. 4). The certificate of insurance also stated "[c]ertificate holder named as additional insured including waiver of subrogation on general liability." This was a waiver of subrogation as to the **general liability policy**. Mr. Oldenberg further explained the statement regarding the additional insured as follows:

[22] He could not recall whether the certificate was mailed directly to KYE or whether it was sent to Employer for Employer to forward to KYE. (EX-10, p. 27). The certificate of insurance does not create insurance coverage, but states the kind of coverage provided for a company; actual coverage comes from the policy and any endorsements. (EX-10, pp. 28-29).

> . . . if I insured [Employer] while doing some work for KYE and they had a loss where they damaged somebody's property, and the person that suffered the loss would go against [Employer], then in that instance, they may also include KYE in a suit against [Employer] for damage of the property.
>
> So what this does, if that were the case, then KYE would be included as an insured right along with [Employer]. So if there were a general liability loss, then KYE would be protected along with [Employer] in a loss.

(EX-10, p. 33).

The policy did not indicate that Carrier waived subrogation. Further, no certification was made to KYE that Carrier would not have the right to recover any losses it pays, if it had a legal right to do so. The certificate did not identify KYE as an additional insured under Carrier's **workers' compensation policy**. (EX-10, p. 34). If there was an Alternate Employer Endorsement, it would have been reflected on the certificate of insurance. (EX-10, pp. 34-35). No one informed Mr. Oldenberg of a need to change coverages or add endorsements after he provided the certificate of insurance. (EX-10, p. 35).

Mr. Oldenberg testified that insurance companies charge an additional premium for a waiver of subrogation or for an endorsement such as an additional insured or an alternate employer endorsement. (EX-10, pp. 36-37). His testimony is unclear as to whether an additional premium was exacted for a waiver or endorsement.

Mr. Oldenberg was aware that Employer was going to do work at KYE or was trying to get on a "bid list" when Employer asked for a certificate of insurance. He did not recall discussing the nature of the work to be performed at KYE and he testified that he would not necessarily discuss the nature of the work with the insurer. (EX-10, p. 63). An auditor would base an audit on the information in the customer's records and the information the customer provides regarding the work that employees do. (EX-10, pp. 65-66).

**Joe Pham (Thoan Pham)**

Mr. Pham, who was deposed by the parties on May 26, 2004, was hired as a superintendent by KYE and remained in that position for the duration of his employment with KYE. (EX-11, p. 30). Vincent Moore offered him a job when the shipyard was named MooreCo.[23] (EX-11, p. 17). Mr. Pham filled out an application for Employer, but Vincent Moore made the decision to hire him.[24] (EX-11, pp. 20-21). Initially, Employer paid Mr. Pham, but throughout the course of his employment Pearl River Construction and Southport also paid him. (EX-11, pp. 10, 18). At the time of his deposition, Mr. Pham worked for KYE, but was paid by "Southport." (EX-11, p. 8).

A representative of Employer went to KYE every week to deliver paychecks and occasionally called Mr. Pham to determine whether KYE needed more workers. (EX-11, pp. 19-20). Employer distributed a "safety book" for KYE, but there was no "safety man" at KYE's facility in May 2002. Mr. Pham took over the "safety man" position and began holding weekly safety meetings. (EX-11, pp. 24-25). KYE followed the OSHA rules regarding safety equipment, requiring workers to use a safety belt, work vest, and safety harnesses. (EX-11, pp. 40-41). Every employee, including Claimant, was given a safety harness. (EX-11, pp. 45-46). Mr. Pham found Claimant to be a good worker, but not always a safe worker. (EX-11, pp. 38-40).

Claimant worked at the KYE facility and quit, but was rehired approximately one month before Mr. Pham was hired. (EX-11, p. 27). Mr. Pham did not know whether the facility was considered MooreCo or KYE at the time of Claimant's injury. (EX-11, p. 28). He estimated that he supervised over 30 employees at the time of the accident. He indicated the employees were paid by Employer, but also stated that five or six employees came from Pearl River. (EX-11, p. 32).

Claimant's accident occurred while he was working on the starboard side of a vessel. (EX-11, pp. 60, 95). Approximately one hour before the accident, Mr. Pham was in the starboard stern compartment where Claimant worked. (EX-11, p. 96). He testified the compartment was not hot and there was plenty of oxygen in the compartment. (EX-11, pp. 97-98). Claimant told

[23] His job did not change at all when MooreCo became KYE. (EX-11, p. 29).
[24] Mr. Pham filled out an application for Employer, an application for the "Mississippi" company, and an application for Southport. (EX-11, p. 29).

Mr. Pham that he felt comfortable and did not need a vent.[25] (EX-11, p. 106). Mr. Pham did not observe Claimant wearing a safety harness, but testified that the safety harness was optional on the level where Claimant was working, which Mr. Pham estimated was "a little bit over 20 feet from the bottom." (EX-11, pp. 113-114, 133).

Mr. Pham left Claimant's work area approximately fifteen minutes before the accident and received a phone call at the office notifying him of the accident. (EX-11, p. 61). He instructed the office clerk to call 911 and immediately returned to the yard. (EX-11, p. 124). He found Claimant collapsed at the bottom of the vessel. (EX-11, p. 127). Mr. Pham brought Claimant out of the hold and had a crane pick him up and place him on land. (EX-11, pp. 131-132).

On the following day, Mr. Pham investigated Claimant's accident and filled out a report.[26] (EX-11, pp. 155-156, 182). He questioned other employees about the accident, but did not ask them to provide written statements. (EX-11, p. 158). No employees saw Claimant actually fall. (EX-11, pp. 159, 161, 173-174). Mr. Pham opined there was no way Claimant could have fallen from the "third level." (EX-11, pp. 162-163). He examined the "third level" and did not find any holes or openings through which a person could fall. (EX-11, pp. 195-196). He believed Claimant either fell while climbing a ladder or while trying to climb over a "shortcut."[27] (EX-11, p. 165).

While Claimant was in the hospital, he told Mr. Pham that he did not know how the accident happened. (EX-11, p. 199).

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[25] According to Mr. Pham, the "hole" was large and the weather was 80 to 85 degrees and windy. Claimant was working on "level three" and there was an air duct on that level. (EX-11, p. 106). The barge AMERICAN FREEDOM had two "blowers" in its engine room, but only one was running on the day of Claimant's accident. (EX-11, pp. 62, 108-109). Additionally, KYE had two "blowers" on the main deck, to which employees could connect tubing that lead into the stern compartment. (EX-11, pp. 109-110). Each worker was responsible for setting up his own ventilation. (EX-11, pp. 110-111).

[26] When asked whether an LS-202 contained his handwriting, Mr. Pham stated that he cannot always read his own handwriting. He further testified that the writing on the LS-202 looked like his handwriting, but the form did not contain his signature. (EX-11, pp. 156-157).

[27] Mr. Pham observed a missing board in scaffolding at the level below where Claimant was supposed to be working. He did not know who removed the scaffolding, but opined it was removed to create a shortcut from level four to level three. (EX-11, pp. 146-147, 166). When "Diamond K" erected the scaffolding and turned the area over to KYE to do steel work, level four had two boards that were tied down and in the correct places. (EX-11, pp. 177-178).

Claimant returned to work approximately two months after the accident with a release to light duty work. (EX-11, p. 202).

A tugboat brought the AMERICAN FREEDOM into KYE's shipyard. (EX-11, p. 115). The tugboat crew did not have the authority to ask KYE's employees to do any welding jobs. (EX-11, pp. 119, 121).

**The Medical Evidence**

**Pendleton Memorial Methodist Hospital (Methodist Hospital)**

On May 27, 2002, Claimant was admitted to the Methodist Hospital emergency room.[28] An admit note indicated Claimant fell approximately 20 feet and hit various structures during the fall. Claimant complained of chest and abdominal pain. (CX-6, p. 3). Claimant had a laceration above his left eyebrow and mandible tenderness. The physician noted a "large contusion on his right flank and upper back" and an "obvious deformity of his left wrist." (CX-6, pp. 3-4). Claimant was admitted to ICU with "continuous antibiotics, pain control, chest tube, and splint management." (CX-6, p. 5). A diagnosis included "bilateral hemopneumothorax, concussion, left wrist fracture, right rib fracture, multitrauma, secondary to a fall 20 feet." (CX-6, p. 6). A "history and physical examination" identified impressions of "blunt trauma to torso," "comminuted fracture, left wrist," and "laceration to left eyebrow, rule out head trauma." (CX-6, p. 8).

A series of chest x-rays dated May 27, 2002, revealed an enlarged heart, a "small pneumothorax" over Claimant's right lung, and "some subcutaneous emphysema in the right lateral chest." (CX-6, pp. 23-25, 27, 30). Additional May 27, 2002 x-rays revealed a radius fracture in Claimant's left wrist. (CX-6, p. 29). A May 28, 2002 CT scan of Claimant's abdomen revealed "minimal fluid and atelectasis in right lung base, with an even smaller amount in the left base." (CX-6, p. 22). As of May 30, 2002, chest images no longer showed evidence of pneumothorax in Claimant's lungs and on May 31, 2002, a report identified improvement in the atelectasis in his left lower lobe. On June 1, 2002, a report noted Claimant's heart size was normal. (EX-6, pp. 16-20).

[28] The medical reports from Methodist Hospital identify admit dates of May 27, 2002 and May 28, 2002. According to the joint stipulations, Claimant's injury occurred on May 27, 2002. Claimant was admitted by Dr. Johnny L. Gibson. (CX-6, pp. 5, 7). Dr. Gibson's credentials are absent from the record.

On May 30, 2002, Dr. George A. Miller found an "abnormal 12 lead electrocardiogram" and planned to "obtain cardiac enzymes to assess for possible cardiac contusion." (CX-6, p. 11). He noted that Dr. Cracco repaired Claimant's left wrist fracture, that Dr. Epps treated Claimant for a traumatic head injury, and that CT scans of Claimant's brain and cervical spine were reportedly within normal limits. (CX-6, pp. 10, 12-13, 21, 26, 28). In response to a letter dated July 24, 2002, Dr. Miller indicated that Claimant had been discharged from his care. (CX-13, p. 3).

On June 6, 2002, Claimant began physical therapy for his wrist fracture and presented with complaints of pain in his left wrist and hand. Claimant was to attend physical therapy three times each week for four weeks. (CX-8, pp. 5-13). On July 1, 2002, July 15, 2002, and August 2, 2002, Claimant received prescriptions for additional periods of physical therapy. (CX-8, pp. 14, 18, 23). Throughout the course of physical therapy, the physical therapist noted improvement and consistently suggested continued physical therapy treatments. (CX-8, pp. 11, 14, 18, 23-24, 28, 33, 43).

**Dr. Alain F. Cracco**

On May 28, 2002, Dr. Cracco examined Claimant at the request of his attending surgeon, Dr. Johnny L. Gibson.[29] Claimant presented with a fracture of "the proximal right fibula with no neurological involvement and a comminuted fracture of the left distal radius." On May 30, 2002, Dr. Cracco performed surgery on the fracture, which involved "application of an Agagee wrist jack external fixator and fluoroscopy."[30] In a letter dated July 3, 2002, Dr. Cracco opined Claimant would reach maximum medical improvement (MMI) with a permanent impairment rating in July 2003 and anticipated a return to work in some capacity in November 2002. (CX-7, pp. 4-5). On July 18, 2002, Dr. Cracco removed Claimant's external fixator and applied an arm cast. (CX-10, p. 2).

On August 2, 2002, Dr. Cracco noted Claimant's fracture was healing, although he identified "some irregularity." (CX-7, p. 9). He continued to recommend physical therapy and anticipated Claimant could return to restricted work in November 2002 and to full duty capacity in January 2003. (CX-7, pp. 9-10, 12). On

[29] Dr. Cracco's credentials are absent from the record.
[30] Dr. Cracco planned to remove the external fixator on July 18, 2002. (CX-7, p. 6).

November 2, 2002, he released Claimant to a trial basis of light duty work for four hours each day. (CX-7, p. 19). He did not assign physical restrictions on the return to light duty. (CX-7, p. 24). On January 22, 2003, Dr. Cracco released Claimant to regular duty work. (CX-7, p. 28).

On February 6, 2003, Dr. Cracco opined Claimant would reach MMI and be discharged from his care in six months. (CX-7, p. 30). On May 25, 2003, he opined that neither Claimant's complaints of vertigo nor the recommendation of an "EGD" were related to the work injury. (CX-7, pp. 32-33).

**Dr. Joseph Epps**

On May 28, 2002, Dr. Epps examined Claimant after a referral by Dr. Gibson.[31] Dr. Epps noted soft tissue swelling in Claimant's left ear and indicated that Claimant was awake and able to verbalize his name, address, and phone number. He diagnosed a closed head injury with a skull fracture and recommended observation and follow-up. (CX-9, p. 4). On August 26, 2002, he opined Claimant did not require further treatment from a neurological standpoint. Dr. Epps indicated Claimant was at MMI and discharged him from care. (CX-9, p. 7). On September 12, 2002, he released Claimant to work without restrictions from a neurological standpoint. (CX-9, p. 9).

**Dr. Dung Tran**

On October 4, 2002, Claimant presented to Dr. Tran with complaints of left hand pain and dizziness.[32] Claimant indicated that he experienced memory impairment, dizziness, chest pain, and hand pain since his work accident. Dr. Tran opined Claimant's abdominal pain was consistent with "reflux" and recommended Claimant undergo an EGD if the abdominal pain recurred within one or two months. On November 11, 2002, he instructed Claimant to see Dr. Glen Hedgpeth for an EGD and to see a neurologist for his vertigo before returning to work. (CX-12, p. 1). On March 24, 2003, Dr. Tran's diagnosis included vertigo and blurred vision.[33] (CX-12, p. 3). On May 25, 2003, Dr. Tran indicated his recommended GI evaluation was not related to the May 27, 2002 work injury. However, his recommendation that Claimant see a neurologist for complaints of vertigo was

[31] Dr. Epps's credentials are absent from the record.
[32] Dr. Tran's credentials are absent from the record.
[33] The March 24, 2003 report is hand-written and contains several illegible notations.

related to the May 2002 work injury, as Claimant sustained a head trauma. (CX-12, p. 5).

**Dr. Morteza Shamsnia**[34]

On October 27, 2003, Claimant complained of experiencing six to seven headaches each week that could each last a few hours. He complained of low back pain, left arm pain, and pain in the rib area. Claimant also presented with complaints of numbness in both hands, difficulty sleeping, and forgetfulness since his work accident. (CX-14, p. 2). Dr. Shamsnia diagnosed "[p]ost concussion syndrome with headaches and memory complaints," "[p]ost traumatic sleep disorder," "[n]eck pain and low back pain," and "[p]ain and paresthesias of the limbs." (CX-14, pp. 4, 20). Dr. Shamsnia ordered an MRI of Claimant's head and entire spine, an EEG, sleep study, and EMG/NCV/DEP of his upper and lower extremities. (CX-14, p. 4). Claimant was taken off work until further notice. (CX-14, p. 5). Claimant presented with unchanged complaints in December 2003 and in January, February, and March 2004; he reported increased headaches, back pain, and dizziness in May 2004. (CX-14, pp. 11, 13, 14, 16, 18). On September 20, 2004, he continued to complain of headaches, difficulty sleeping, neck pain, low back pain, left wrist pain, and hand numbness. (CX-14, p. 24). He presented with similar complaints in January, April, and June 2005. (CX-14, pp. 26, 33, 35).

In response to a letter dated June 25, 2004, Dr. Shamsnia related his earlier diagnoses to Claimant's work injury because of the trauma to his head and body. He again recommended an MRI, EMG, and sleep study and opined Claimant could not return to work in any capacity. (CX-14, p. 20).

**Dr. Paul Dash**[35]

On July 28, 2004, Dr. Dash examined Claimant at Employer's request. Claimant provided a history of his work accident, injuries, and medical treatment. He presented with complaints of daily headaches, persistent rib pain, residual pain in his left hand, ongoing pain in his jaw, dizziness, and depression. (CX-15, pp. 1-2). Claimant indicated that he no longer climbed ladders due to fear that his dizzy spells would cause him to fall. He experienced pain with prolonged sitting. Grass cutting was the most activity Claimant performed around the

[34] Dr. Shamsnia's credentials are absent from the record.
[35] Dr. Dash's credentials are absent from the record.

house, but he would have to take frequent breaks. (CX-15, p. 2). After physical examination, Dr. Dash formed the following impressions: "[s]tatus post closed head injury with residual complaints of headaches and vertigo," "[d]epression," "[p]ossible posttraumatic left carpal tunnel syndrome," "[r]esidual tendency toward muscular spasms in the ribs," and "[m]ild persistent jaw pain." (CX-15, p. 3).

Dr. Dash opined Claimant's problems were the result of the May 2002 injury. He further opined Claimant was unable to return to his prior employment, noting that Claimant's concerns regarding rib cramping and dizziness would be a potential cause of danger. Dr. Dash opined Claimant could perform work that did not involve climbing or being in the water and he suggested lifting of no more than 25 pounds. He felt Claimant's condition to be "permanent and stationary," but he also recommended an EMG and nerve conduction study of Claimant's left hand to rule out carpal tunnel syndrome. He felt treatment with a anti-depressant was warranted, as well as a trial of a muscle relaxant. (CX-15, p. 3).

**The Contentions of the Parties**

Claimant contends the only real dispute in this matter concerns which entity is obligated to pay Claimant's compensation benefits. Claimant contends Employer and Carrier are obligated to pay his benefits based on the contract between Employer and KYE, noting that the U.S. District Court ruled that Employer contractually agreed to remain responsible for the workers' compensation claims of its employees.[36]

Carrier contends KYE is responsible for all of Claimant's benefits under the Act because KYE is the borrowing employer. It argues that an attempt to contract around the borrowed employer's liability "by an agreement between the lender and the borrower presents issues not germane to the task of an Administrative Law Judge . . .." It argues the contractual rights between Employer and KYE are irrelevant to the issue of responsible employer and should be addressed in proceedings separate from the Claimant's compensation claim because the borrowing employer is the responsible employer for compensation purposes. Carrier further contends that a contractual indemnity right between Employer and KYE does not give Claimant the right to receive benefits directly from Employer as KYE's indemnitor.

[36] The undersigned notes that the Fifth Circuit affirmed the District Court's decision.

## IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

### A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

The parties stipulated that Claimant sustained an injury on May 27, 2002, during the course and scope of his employment, while working as a borrowed employee of KYE and while on the payroll of Employer. After reviewing the testimony and medical evidence of record, I find and conclude the record supports the foregoing stipulation.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on May 27, 2002, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

**B. Nature and Extent of Disability**

The parties stipulated that Claimant suffers from a compensable injury; however, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his

inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

**C. Maximum Medical Improvement (MMI)**

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction

Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000); (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

The parties stipulated that Claimant has not reached MMI. Additionally, although not included in the written stipulations submitted by the parties, Carrier agreed at formal hearing that a finding of temporary total disability would be appropriate if supported by the medical records of evidence. (Tr. 19-20).

The Methodist Hospital emergency room reports indicate Claimant sustained several injuries as a result of his work-related accident, including injuries to his head, back, and left wrist. It is noted that Dr. Epps assigned MMI from a neurological standpoint in August 2002 and Dr. Cracco assigned an MMI date for Claimant's wrist injury in January 2003. However, Dr. Shamsina later diagnosed "[p]ost concussion syndrome with headaches and memory complaints, "[p]ost traumatic sleep disorder," "[n]eck pain and low back pain," and "[p]ain and paresthesias of the limbs," and opined Claimant's conditions

were related to his work injury. Because Dr. Shamsina's diagnoses occurred subsequent to the assignment of MMI dates by Drs. Epps and Cracco, I find and conclude the absence of an assignment of MMI by Dr. Shamsnia supports the parties' stipulation that Claimant has not reached MMI. Although Dr. Dash indicated Claimant's condition was "permanent and stationary," I afford greater weight to Dr. Shamsnia's opinion as the treating physician.

Although Drs. Epps and Cracco respectively discharged Claimant to return to work without restrictions from a neurological standpoint and with regard to his left wrist injury, Dr. Shamsnia opined Claimant could not return to work in any capacity and Dr. Dash opined Claimant could not return to his prior employment. The credentials of the foregoing physicians are absent from the record. However, I afford greater weight to the opinions of Drs. Shamsnia and Dash because their opinions are more recent and arguably considered Claimant's complaints as a whole, while Drs. Epps and Cracco each released Claimant to return to work based on only one aspect of his complaints. Accordingly, I find and conclude the medical reports of record support a finding of total disability, as Claimant was unable to return to his former employment.

Based on the foregoing, I find and conclude Claimant is temporarily totally disabled from May 27, 2002 to present and continuing. Because the record contains no evidence of suitable alternative employment, I further find and conclude Claimant is entitled to temporary total disability benefits from May 27, 2002 to present and continuing based on his average weekly wage of $722.64.

**D. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the

expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Although the parties did not present medical benefits as an unresolved issue, I find it necessary to address Claimant's entitlement to medical benefits based on the stipulation that his medical benefits were paid until November 29, 2004. Dr. Shamsnia indicated that his diagnoses were related to Claimant's work accident due to trauma to his head and body. Although Dr. Shamsnia's most recent report is dated June 25, 2004, the record does not contain a subsequent opinion discharging Claimant from treatment. Similarly, Dr. Dash opined his diagnoses resulted from Claimant's work-related accident and, on July 28, 2004, he suggested an EMG and nerve conduction study of Claimant's left hand, as well as treatment with an anti-depressant and a muscle relaxant. As with Dr. Shamsnia, Dr. Dash did not provide a subsequent opinion discharging Claimant from his care or opining that continuing medical treatment was unnecessary or unreasonable.

Although the physicians' qualifications are not included in the record, the record does not contain any contrary medical evidence indicating that treatment recommended by Claimant's physicians after November 29, 2004, would be unreasonable, unnecessary, or inappropriate. Accordingly, I find and conclude Claimant is entitled to all reasonable and necessary medical treatment for his injuries related to the May 27, 2002 work accident.

**E. The Responsible Employer/Carrier**

**1. The Responsible Employer**

Section 4(a) of the Act provides that an employer shall be liable for the payment of compensation, medical benefits, and death benefits due an injured employee and, therefore, must secure payment of these benefits by becoming insured or by qualifying as a self-insurer. 33 U.S.C §904(a).

The borrowed employee doctrine recognizes that:

> [o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, **so that he becomes the servant of that person with all the legal consequences of the new relation.**"

Total Marine Services v. Director, OWCP, supra at 777, citing Standard Oil Co. v. Anderson, 212 U.S. 215 (1990)(emphasis in original). This leads to the conclusion that the borrowing

employer is liable for securing the injured claimant's compensation benefits under the Act. Id.; see also Champagne v. Penrod Drilling Co., 341 F.Supp. 1282, 1283 (W.D. La. 1971), aff'd, 459 F.Supp. 1042 (5th Cir. 1971), modified on other grounds, 462 F.2d 1372 (1972), cert denied 409 U.S. 1113 (1973); West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985).

In the present matter, the parties agree and the record supports a finding that KYE is a borrowing Employer. Further, Judge Duval ruled on this specific issue and concluded that KYE was a borrowing Employer. Based on the foregoing, I find and conclude that KYE was a borrowing employer of Claimant in the present matter and is liable for Claimant's compensation benefits under the Act.

**2. The Responsible Carrier**

Claimant contends Employer and Carrier are obligated to pay Claimant's benefits based on the contract between Employer and KYE. Claimant argues that Carrier's additional defenses to its coverage of Employer's obligations should properly be raised before an Article III court of general jurisdiction. In support of its contentions, Claimant notes that the insurance policy itself indicated that Carrier provided workers' compensation coverage to Employer. Claimant points out that the policy specifically covered all of Employer's workplaces in Louisiana, that Mr. Prudhomme testified that the policy covered longshore claims, and that an audit form listed Claimant as a longshore employee. Claimant further contends that improper classification of Employer's employees should result in a change in the classification and collection of the proper premiums from Employer, rather than a denial of coverage. Lastly, Claimant contends the contract between Employer and KYE constituted a **stipulation pour autri** under Louisiana law, as it was a contract made for the direct benefit of Claimant, and would make Employer liable for Claimant's benefits. Claimant argues the insurance policy covered Employer's workers' compensation obligation and the policy did not contain language that would exclude coverage for this obligation.

Carrier contends it is not the responsible carrier in the present matter because it did not insure the compensation obligations of the responsible employer, KYE. Carrier argues that it provided insurance to cover Employer's LHWCA obligations, but did not cover the obligations of KYE or any other entity. Carrier further argues that Employer did not actually procure insurance coverage in favor of KYE and points out that its coverage of Employer did not automatically operate

in favor of KYE. It contends that the District Court did not rule that Employer must indemnify KYE; rather, according to Carrier, the indemnity clause "prevents [Employer] from seeking reimbursement from KYE for the LHWCA benefits that [Employer], through [Carrier], has already provided to [Claimant]."

By providing compensation insurance under the Act, an insurance carrier becomes bound for the full obligation of the employer. 33 U.S.C. § 935; 20 C.F.R. § 703.115; Crawford v. Equitable Shipyards, Inc., 11 BRBS 646 (1979), aff'd per curiam sub nom. Employers National Insurance Co. v. Equitable Shipyards, Inc., 640 F.2d 383 (5th Cir. 1981).

The carrier at the time of a traumatic injury is liable for employer's obligations resulting from that injury. With multiple traumatic injuries, designation of the responsible carrier is based on the same analysis used in determining the responsible employer. Crawford v. Equitable Shipyards, Inc., supra; Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 (1981).

Where necessary to resolve a claim for compensation benefits, the administrative law judge may adjudicate insurance contract disputes. Rodman v. Bethlehem Steel Corp., 16 BRBS 123 (1984); Valdez v. Bethlehem Steel Corp., 16 BRBS 143 (1984); Droogsma v. Pensacola Stevedoring Co., Inc., 11 BRBS 1 (1979).

Both parties rely on Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5th Cir. 2001). In Temporary Employment Services, an ALJ initially ruled that the borrowing employer, Trinity Marine Group (Trinity), was solely responsible for the claimant's benefits and ordered Trinity to reimburse the benefits paid by the lending employer's carrier, Maryland Casualty Company (Maryland). The Board remanded the matter to the ALJ to consider whether a valid contractual obligation existed between the lending employer and Trinity, which would obligate the lending employer to pay the benefits owed to the claimant. On remand, the ALJ found an indemnity agreement existed and also held that the carrier's insurance policy contained a waiver of subrogation in favor of Trinity. Maryland reimbursed Trinity for the benefits Trinity paid to the claimant and for the amount Trinity had paid to Maryland. The Board affirmed the ALJ's holding on remand.

The lending employer and Maryland appealed to the U.S. Fifth Circuit Court of Appeals, which addressed the issue of whether Trinity had "contracted around" its liability under the

Act through its agreements with the lending employer and Maryland. The Fifth Circuit noted that Trinity's claims were dependent upon contractual provisions that were not governed by the Act and found the contractual issues presented were "beyond the scope of the authority granted to the LHWCA administrative tribunals." Temporary Employment Services, supra at 459-460.

In reaching its conclusion, the Fifth Circuit determined that a plain reading of Section 19(a) of the Act indicated that an ALJ's authority extends only to questions that are in respect of the LHWCA claim of an injured or deceased worker. 33 U.S.C. § 919(a). The Court further explained that the disputed issue must be "'integral to deciding the compensation claim.'" Temporary Employment Services, supra at 462, citing Equitable Equip. Co. v. Director, OWCP, 191 F.3d 630 (5th Cir. 1999). It noted that courts have focused on the fact that the disputed issue must be essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law. The court found the presented dispute did not involve the claimant's entitlement to benefits or the question of who, under the Act, was responsible for paying those benefits. Because the Fifth Circuit found that all of the issues under the Act had been adjudicated, it determined that an adjudication of who else may be liable on other grounds was unnecessary to the objective of the Act. Id. at 463-464.

In the instant case, the parties agree that KYE was the borrowing employer and, consequently, I have found KYE to be the responsible employer for Claimant's compensation under the Act. As in Temporary Employment Services, the only remaining issue is the responsible carrier, which requires interpretation of contractual provisions to determine whether the insurance coverage provided by Carrier to Employer extends to the liabilities of KYE as the borrowing employer. Because the present matter arises within the Fifth Circuit, I find the holding in Temporary Employment Services is controlling and conclude that an interpretation of the contractual provisions between the parties is beyond the scope of authority granted under the Act and should properly be raised and addressed in an Article III court of general jurisdiction.

Prior to formal hearing in this matter, the U.S. District Court for the Eastern District of Louisiana held that a valid indemnity agreement existed between Employer and KYE and dismissed an intervention filed by Carrier. The Fifth Circuit affirmed the ruling. Although the courts found that the

indemnity agreement precluded Carrier from seeking reimbursement from KYE for benefits it paid to Claimant, I nonetheless find the Article III courts did not determine the issue presented in the present matter because neither ruling expressly addressed whether the insurance coverage contracted in favor of Employer extended to the liabilities of KYE, whether KYE was an additional assured or whether a waiver of subrogation existed. Accordingly, I find and conclude the question of whether Carrier is contractually responsible for compensation benefits owed by KYE as the borrowing employer has not yet been decided by an Article III court of general jurisdiction.

Based on the foregoing, I find and conclude the undersigned lacks the jurisdictional authority to interpret contractual provisions to determine whether Carrier provided insurance coverage for the liabilities of KYE.

Nevertheless, as correctly noted by Employer/Carrier, if insurance coverage was not secured by KYE for its compensation obligations, under Section 38(a) of the Act, corporate officers of KYE may be individually liable for compensation. Moreover, if KYE defaults on its obligation, Claimant may arguably seek recovery from the Special Fund established by Section 44 of the Act under procedures set forth in Section 18(a) of the Act.

## V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides

for its specific administrative application by the District Director.

## VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[37] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. KYE shall pay Claimant compensation for temporary total disability from May 27, 2002 to present and continuing, based on Claimant's average weekly wage of $722.64, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. KYE shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 27, 2002, work injury, pursuant to the provisions of Section 7 of the Act.

3. KYE shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

4. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to

[37] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 17, 2004**, the date this matter was referred from the District Director.

file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 13th day of March, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge